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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SFPP, L.P.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION; UNITED STATES OF AMERICA; *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. The Decision Below Conflicts With This Court's Precedent And With The Interstate Commerce Act 2

II. This Case Is Vitally Important To A Number of Regulated Industries 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932) ..... 1, *passim*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 6

FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) 6, 8

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 5, 8

Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) 8

Oxy USA v. FERC, 64 F.3d 679 (D.C. Cir. 1995) 8

SEC v. Chenery Corp., 332 U.S. 194 (1947) 7

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 5, 6

United States v. City of Fulton, 475 U.S. 657 (1986) 6

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

Interstate Commerce Act

49 U.S.C. § 15(1) 4, 5

49 U.S.C. § 15(7) 5

Natural Gas Act

15 U.S.C. § 717c(e) 5

INTRODUCTION

The government's brief in opposition confirms the need for review by this Court. First, the government's argument demonstrates the serious confusion the decision below has created regarding *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932). The government mistakes *Arizona Grocery* for a case turning on finality, when in fact it is a case about the limits Congress imposed on the agency's power to order reparations after it changes a carrier's rates. That confusion has led the government to focus on irrelevant aspects of *Arizona Grocery* while ignoring the distinction between carrier-made and Commission-made rates that lies at the heart of the Court's reasoning in that case. The shippers' brief in opposition highlights the absurdity of making "finality" the touchstone by suggesting that the agency could continually set "interim" rates and thereby avoid *Arizona Grocery* altogether. In short, the opposition briefs confirm rather than dispel the conflict between *Arizona Grocery* and the decision below.

Second, the government's opposition highlights the importance of the question presented. The Petition raises a clearly-focused legal issue that is important to a range of regulated industries. In relying on precedent from other industries, the government implicitly acknowledges that the rule applied in this case will reach well beyond FERC oil pipeline regulation. The government does not deny the need for certainty and repose in this area of the law. Nor does it deny that the ruling below could have serious adverse effects on energy industries that are vital to the Nation's economy. Review is warranted to bring the D.C. Circuit, which handles the great majority of rate review cases, back into line with this Court's precedent.

ARGUMENT

I. The Decision Below Conflicts With This Court's Precedent And With The Interstate Commerce Act

As the Petition explains, *Arizona Grocery* – a cornerstone of rate regulation for over seventy years – unambiguously holds that reparations cannot be awarded on agency-imposed rates. The *Arizona Grocery* rule was based on the statutory dichotomy between carrier-made and Commission-made rates that Congress crafted in the Interstate Commerce Act ("ICA"), and the central premise that an agency has no power to impose rates that are anything other than just and reasonable. The decision below conflicts with *Arizona Grocery* and the ICA by holding that a carrier can be liable for reparations on a Commission-ordered rate so long as it is labeled an "interim" rate rather than a "final" one.

Perhaps most telling is what the government's opposition does *not* do: address the difference between carrier-made and Commission-made rates. The agency's authority to order reparations or other relief turns on this difference. As the Petition points out, Congress gave the agency two options in a complaint case: (1) it can wait to prescribe rates until completing its proceedings, with reparations up to the date prescription occurs available to complaining shippers, or (2) it can act before proceedings are complete and impose a prospective rate reduction applicable to *all* shippers, but thereby terminate the reparations period and preclude any retrospective relief from the rates it has imposed. *See* Petition at 13. That design protects both the rights of complaining shippers and the carrier's freedom to set rates for the use of its assets unless and until the Commission imposes just and reasonable rates "to be thereafter observed." *See* Petition at 14-15. Both options were available to FERC here. However, instead of taking either it attempted to create a third alternative by requiring rate reductions *and*

subsequently ordering reparations and refunds from those very rates. The court of appeals permitted FERC to exceed its authority and upset the careful balance struck in the ICA. The failure of the government to defend, or even mention, the agency's statutory authority is a powerful sign that certiorari is warranted.

The government also ignores the fact that the decision below subjects carriers to increased uncertainty and increased liability – the very things the ICA's scheme was designed to prevent. *See* Petition at 17-18. When a shipper complains about a Commission-made rate, it can only obtain prospective relief, and no one is entitled to reparations. When a shipper files a complaint against a carrier-made rate, it may be awarded reparations but shippers who did *not* complain do *not* receive reparations. The decision below permits a situation in which a complaint by one shipper can result in retrospective damages for *all* shippers from the date of the first "interim" rate. The government does not even address this outcome, which plainly was not intended by Congress.

The government's failure to address the limited statutory options that Congress provided in the ICA and that this Court definitively addressed in *Arizona Grocery* leads it to misapprehend the impact on SFPP and other carriers. The government is simply wrong in claiming (Opp. 25) that waiting until "the end of the entire case" to order rate reductions and reparations "would have left SFPP in exactly the same ultimate position" as the "interim" rate orders, reparations and refunds FERC required. Waiting certainly would have protected the complainants, to whom reparations would have been available at the end of the case. However, it would not have reduced rates for non-complaining shippers until the conclusion of the process, and quite properly would have entitled those shippers to no reparations or refunds at all. In contrast, the approach the court of appeals approved

reduced rates for *all* shippers under the first rate order, but also gave non-complaining shippers as well as complainants damages under the subsequent orders. The latter approach resulted in SFPP having to pay out millions of dollars more, to shippers who had never complained their rates were too high. This substantially increased SFPP's liability since non-complaining shippers accounted for approximately half of the movements at issue.

When the government does address the merits of SFPP's arguments, it shows confusion. The government presents *Arizona Grocery* as a case about finality. *E.g.*, Opp. 23. But neither the ICA nor *Arizona Grocery* makes such a distinction; the operative question is whether rates are carrier- or Commission-made. *See Arizona Grocery*, 284 U.S. at 387. While the ICA gives the Commission the power to tell carriers what rates to charge for use of their own assets, it only provides authority "to fix a maximum or minimum reasonable rate" and the Commission "is precluded by the statute from fixing one which is unreasonable." *Id.* at 387. In considering a later request for reparation, the Commission may not "retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." *Id.* at 389. Such reparations (and refunds) are precluded by the Commission's exercise of its quasi-legislative powers.

The Court in *Arizona Grocery* explicitly held that once the agency has "declared what is the maximum reasonable rate to be charged by a carrier, *it may not at a later time, and upon the same or additional evidence* as to the fact situation existing when its previous order was promulgated," change those findings. 284 U.S. at 390 (emphasis added). Here, FERC declared the reasonable rates under Section 15(1) for SFPP's East Line, and SFPP had to comply with that order by filing tariffs with changed rates computed under FERC's directives. *See Arizona Grocery*, 284 U.S. at 386 (Commission prescriptions have "the force of a statute" to

which carriers are "bound to conform"). Key to *Arizona Grocery* is that, once the agency has acted under Section 15(1), it does not have the authority to later change its mind as to shipments that have already moved under the prescribed rates. *See id.* at 389. Whether this is done in one docket (as here) or in two dockets (as in *Arizona Grocery*) is irrelevant.

The government is again wrong in contending *Arizona Grocery* can be distinguished on the ground that the agency there – the Interstate Commerce Commission – did not assert that its initial rate prescription was only a tentative ruling. *See* Opp. 10. That is not correct. In its brief to this Court, the ICC raised as "an added consideration" that the original rate prescription was made on a "partial" record and that the complainant put the carriers "on notice" that it intended to seek a lower rate. Brief of the Interstate Commerce Commission as *Amicus Curiae*, at 9-10, 21 (filed Nov. 10, 1932) (Docket No. 98). The ICC emphasized that the original decision was the "first of three cases" and that "the rates involved were repeatedly under fire." *Id.* at 10, 21; *see id.* at 21 ("there was constant agitation about the rates"); *see also* 284 U.S. at 379-80 (reporter's summary of ICC brief). Thus, in defending its reparations award, the ICC relied heavily on record evidence that the carrier was on notice that the original rate prescription was only a first step and subject to change based on a more complete record. *Amicus Curiae* Brief of the ICC, at 21. This Court, however, gave that argument no weight.

Because the government fails to appreciate the underlying statutory basis for *Arizona Grocery*, it is not surprising that the cases on which it relies are inapt. For example, the government relies on snippets of this Court's opinions in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), and *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962). Both cases stand for the proposition – not germane to the issue here – that a rate proposed by the

carrier may be suspended under ICA Section 15(7) and NGA Section 4(e), respectively, and subject to damages. Indeed, the government concedes (Opp. 21-22) those cases involved new rates. Neither case supports the unprecedented holding in this case, which exposes a carrier to liability for charging a rate that the *Commission* itself prescribed under ICA Section 15(1).

TAPS is also inapt because the issues here do not involve a "statutory void." Whatever continuing validity the concept of implied "ancillary" powers for federal agencies might have after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), there is no statutory void here to be filled. This Court long ago construed the ICA provisions on Commission-made rates in *Arizona Grocery*, and Congress has let that rule stand for more than seven decades. There is no room left to infer "ancillary" powers that would permit agencies to circumvent that settled law. The government's heavy reliance on *TAPS* only further demonstrates the need for guidance from this Court.

FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942), likewise provides no support. There, the agency determined that the regulated company's return had exceeded the fair return and that its rates were therefore "'unjust, unreasonable, and excessive,'" and this Court affirmed that order. *Id.* at 580. No damages or other retrospective relief were at issue in that case, so the focus of the agency's decision was its ordering of a *prospective* reduction in rates. For similar reasons, shippers' reliance on *United States v. City of Fulton*, 475 U.S. 657 (1986), is misplaced. That case involved a "quite different statutory scheme" than the ICA, *id.* at 671, and one that in any event did not authorize reparations against a carrier charging agency-prescribed rates.

The shippers' arguments demonstrate that the government's "finality" theory significantly expands agency authority beyond the clear limits of the ICA. In the shippers'

view, "the Commission's decisions are – until rendered final on direct review – subject to revision." Shipper Opp. 20. Shippers argue that, because an agency order can be modified on rehearing or overturned on review, the agency may change its own prior rate prescriptions *nunc pro tunc*. *Id.* at 20-21. In the shippers' view, administrative rehearings and reopenings could extend a proceeding indefinitely and might never yield a "final" rate prescription affording *Arizona Grocery* protection. But that plainly is not what Congress or this Court intended. Making the *Arizona Grocery* rule turn on "finality" rather than the fact there has been an agency prescription not only is bad policy that invites dilatory tactics but also runs head-on into the ICA's fundamental goal to "render rates definite and certain." *Arizona Grocery*, 284 U.S. at 384.

While neither opposing brief offers a meaningful defense of the circuit court's legal analysis, shippers seek to come to the rescue by relying upon a ground not presented by the agency, either in FERC's orders or in its briefs. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Shippers claim the agency never prescribed a rate at all. *See* Shipper Opp. 10-13. To the contrary, the rates at issue were clearly Commission-made. SFPP was required to file those rates when and how the Commission directed. *See* App. 99a ("[w]ithin 30 days … SFPP shall file revised tariffs reflecting the changes to the calculation of its East Line rates required by this order"); *see also* App. 96a (referring to the "revised East Line rates required by this order"); App. 115a ("[i]n the prior orders the Commission established the just and reasonable rates for SFPP's East Lines"); App. 102a. FERC did not simply require SFPP to submit compliance filings and rate calculations for further analysis, as the shippers contend. Shipper Opp. 13. Instead, it imposed a detailed rate methodology, specified the inputs to be used and ordered SFPP to file changed East Line rates on that basis, which

sharply reduced rates for all shippers. "[T]he agency's order of a ratemaking formula amounts to the prescription of rates." *Oxy USA v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (brackets omitted); *Moss v. CAB*, 430 F.2d 891, 897-98 (D.C. Cir. 1970). Simply stated, these rates were the polar opposite of voluntary, carrier-made rates.

In short, the government's arguments and the plainly inapposite cases on which it relies highlight the confusion the decision below has created about the scope of *Arizona Grocery* and the powers Congress delegated in the ICA. In view of the confusion the decision below creates on a fundamental issue of rate regulation and a long-settled precedent, review by this Court is warranted.

II. This Case Is Vitally Important To A Number of Regulated Industries

The legal issue raised in the Petition is one of profound practical importance. The Petition demonstrates the recurring importance this issue will have for a wide range of regulated industries. The government and shippers do not disagree that the issue is an important one with widespread impact; they only offer formulistic arguments on the merits. Indeed, the government's response confirms the breadth of the impact the decision below will have. By relying on the two Natural Gas Act cases discussed above – *Tennessee Gas Transmission Co.* and *Natural Gas Pipeline Co.* – the government has acknowledged that this case is not just about FERC's regulation of oil pipelines under the ICA. The government does not even attempt to address the recent cases cited in the Petition, involving agencies other than FERC, that raise the same problem and thus demonstrate the need for prompt correction by this Court. *See* Petition at 19-20.

Absent that correction, the decision below will have serious effects on all of these industries. As SFPP explained, the decision is incompatible with principles of fairness and

repose that have special importance in this context. *See* Petition at 19. The government does not show otherwise.

The decision below is a frontal assault on basic ratemaking principles that ensure predictability and certainty. Those principles are firmly rooted in the ICA, were affirmed in *Arizona Grocery*, and – as this Court has recognized – are in accord with a finely-balanced sense of fairness. *See* Petition at 17-18. This Court should exercise its jurisdiction to reaffirm that a carrier may rely on an agency's decisions that set the rates the carrier may charge. Only prompt review can give force to the intent of Congress and ensure repose in this important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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